7-17-2012

State v. Day Respondent's Brief Dckt. 39044

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39044
	)	
vs.	)	
	)	
KIM J. DAY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

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District Judge

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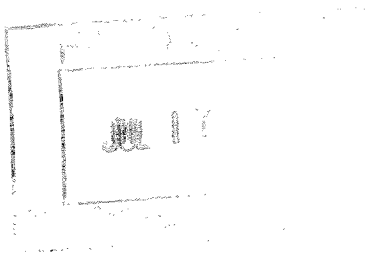

ATTORNEY FOR
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STATEMENT OF THE CASE

Nature of the Case

Kim J. Day appeals from the judgment of conviction entered upon a jury verdict finding him guilty of lewd conduct with a minor under sixteen.

Statement of Facts and Course of Proceedings

Nine-year-old K.S. lived in Bingham County with her mother, her step-father, Day, and her nine-year old cousin, S.P. (Tr., p.132, L.10 – p.135, L.4; p.159, L.19 – p.161, L.22.) During the winters in late 2007 and 2008, K.S. and Day would engage in a game called "ice wars" in which K.S. and Day would go into a hot tub and try to put ice cubes and snow down each others' swimsuits. (Tr., p.134, L.25 – p.141, L.18.) Several years later, K.S. reported to her mother and law enforcement officers that Day touched her underneath her swimsuit on her vagina during this game. (PSI, p.2.) K.S. also reported that Day pushed her hand down his swimsuit to where she would feel his genitals. (Id.) The state charged Day with lewd conduct. (R., pp.43-44.) Because Day had two prior felony convictions, the state also charged him with the persistent violator sentencing enhancement. (Id.)

At trial, K.S. described Day's conduct. (Tr., p.134, L.25 – p.156, L.21.) K.S. testified that, on a particular occasion, Day put ice down the bottom of her swimsuit, told her that he had lost the ice, and then felt around with his hand, touching K.S.'s vagina. (Tr., p.143, Ls.1-14.) Earlier on that occasion in the hot

tub, K.S. put a snowball down Day's swimsuit. (Tr., p.143, Ls.21-25.) When this occurred, Day grabbed K.S.'s elbow and put her hand further down his own swimsuit to where K.S. could feel Day's erect penis. (Tr., p.143, L.21 – p.144, L.18.) K.S. then left the hot tub and went inside the house. (Tr., p.145, Ls.9-15.) Inside, K.S. told Day that she did not like what happened in the hot tub. (Tr., p.145, Ls.16-19.) Day told K.S. not to say anything to her mother. (Tr., p.145, Ls.20-22.) The next time Day asked K.S. to play "ice wars," K.S. told Day that she would not, because she was not comfortable with it. (Tr., p.146, L.3 – p.147, L.8.) K.S.'s cousin S.P. also testified. (Tr., p.159, L.17 – p.166, L.11.) S.P. testified that she saw Day put ice down the top of K.S.'s swimsuit and touch her breast. (Tr., p.162, L.12 – p.163, L.24.)

Bingham County Detective Justin Dance testified about an interview he conducted with Day. (Tr., p.171, L.6 – p.178, L.8.) In that interview, Day stated that while playing "ice wars" with K.S., his hand hit or touched K.S.'s vaginal area several times, and that he continued playing the game after these contacts occurred. (Tr., p.176, L.24 – p.178, L.8; p.184, L.12 – p.185, L.4; p.186, L.18 – p.187, L.14.) Day asserted, however, that such contacts were accidental consequences of what he described as a competitive game. (Id.) The state admitted an audio recording of this interview into evidence and played it for the jury. (Tr., p.192, L.20 – p.193, L.17; State's Exhibit D.)

Day testified in his own defense. (Tr., p.203, L.23 – p.230, L.4.) He admitted playing the "ice wars" game with K.S. and touching her vaginal area. (Tr., p.207, L.3 – p.214, L.8; p.223, Ls.6-11; p.227, Ls.7-20.) However, Day asserted that his contact with K.S.'s vaginal area was accidental, and that the game was not sexual in nature. (Tr., p.211, Ls.4-17; p.213, Ls.6-19; p.223, Ls.6-11; p.227, L.10 – p.228, L.4.) Day denied fondling K.S.'s breasts or holding K.S.'s hand down in his swimsuit. (Tr., p.210, Ls.7-19; p.214, Ls.9-13.) Day also testified that he would not have wanted anyone to touch his genitals because he had a painful cyst on his testicle and associated symptoms since 1987. (Tr., p.214, L.9 – p.219, L.5.) In rebuttal, the state called Day's wife who testified that she had been married to Day since 2003, that they had sex during the marriage, and that Day never told her he had pain in his testicles. (Tr., p.230, L.24 – p.232, L.20.)

The jury found Day guilty of lewd conduct. (Tr., p.262, L.17 – p.263, L.5.) Day then pled guilty to the persistent violator sentencing enhancement. (Tr., p.265, L.2 – p.267, L.13.) The district court entered a unified 15-year sentence with five years fixed. (R., pp.155-157.) Day timely appealed. (R., pp.164-166.)

ISSUE

Day states the issue on appeal as:

> Did the district court err by incorrectly instructing the jury on the elements of lewd conduct?

(Appellant's Brief, p.4.)

The state rephrases the issue as:

Has Day failed to meet his burden of establishing he is entitled to relief based upon his unpreserved due process claim of a variance between the jury instructions and the facts alleged in the charging document?

ARGUMENT

Day Has Failed To Meet His Burden Of Establishing He Is Entitled To Relief Based Upon His Unpreserved Due Process Claim Of A Variance Between The Jury Instructions And The Facts Alleged In The Charging Document

A. Introduction

Day contends, for the first time on appeal, that there was a fatal variance between the charging document and the lewd conduct jury instruction. (Appellant's brief, pp.5-8.) While the state concedes that a variance existed, the record reveals that it did not rise to the level of fundamental error.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Pina, 149 Idaho 140, 147, 233 P.3d 71, 78 (2010) (citing State v. Young, 138 Idaho 370, 372, 64 P.3d 296, 298 (2002)). Whether there is a variance between a charging document and the jury instructions at trial, and whether such variance is fatal to the conviction, are also questions of law given free review on appeal. State v. Sherrod, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998).

C. Day Has Failed To Show His Variance Claim Constitutes Fundamental Error

"A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment." Dunn v. United States, 442 U.S. 100, 105 (1979). A variance also occurs where the jury instructions given at trial

allow the jury to convict the defendant of the charged crime, but also create the possibility of a conviction on one or more alternative theories than alleged in the charging document. See, e.g., State v. Windsor, 110 Idaho 410, 716 P.2d 1182 (1985).

If it is established that a variance exists, the appellate court must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. See State v. Brazil, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001). A variance is fatal if it amounts to a "constructive amendment" or "deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy." State v. Jones, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003); State v. Adamcik, 152 Idaho 445, ___, 272 P.3d 417, 451 (2012) (quoting Windsor, 110 Idaho at 417–18, 716 P.2d at 1189–90; State v. Wolfrum, 145 Idaho 44, 47, 175 P.3d 206, 209 (Ct. App. 2007)). A constructive amendment occurs if a variance alters the charging document to the extent the defendant is tried for a crime of a greater degree or a different nature. Jones, 140 Idaho at 49, 89 P.3d at 889; State v. Colwell, 124 Idaho 560, 566, 871 P.2d 1225, 1231 (Ct. App. 1993).

In addition, where, as here, the defendant did not object to the alleged error below, he has the burden of demonstrating fundamental error in order to obtain relief. State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010). To carry that burden, Day must demonstrate that the error he alleges "(1) violates one or more

of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) demonstrate that the error affected [his] substantial rights, meaning (in most instances) that it must have affected the outcome of the trial." Perry, 150 Idaho at 226-228, 245 P.3d at 978-980.

Day concedes that he did not object to the jury instructions. (Appellant's brief, p.5.) His claim that those instructions impermissibly varied from the allegations of the charging document and the evidence adduced at trial is, therefore, not preserved and he is not entitled to relief absent a showing of fundamental error. Perry, 150 Idaho at 225, 245 P.3d at 977; State v. Grove, 151 Idaho 483, 493, 259 P.3d 629, 639 (Ct. App. 2011).

The state concedes that there was a variance in this case. The Information alleged that Day "had manual to genital contact with K.S. and/or caused K.S. to have manual to genital contact with [him]." (R., pp.43-44.) At trial, the instructions advised the jury of this charge and the alleged facts in nearly identical language. (R., p.116.) However, the jury instructions also contained an instruction that, in order for the jury to find Day guilty of lewd conduct, the state must prove that Day, "committed an act or acts of manual-genital contact or any other lewd or lascivious act upon or with the body of [K.S.]." (R., p.120.) Further, at trial, S.P. testified that she saw Day touch K.S.'s

breast. (Tr., p.162, L.12 – p.163, L.24.) Therefore, the instruction theoretically allowed the jury to convict Day for his act of touching K.S.'s breast, even though such touching would not constitute lewd conduct. See State v. Kavajecz, 139 Idaho 482, 486-487, 80 P.3d 1083, 1087-1088 (2003) (holding that the act of touching a minor's chest area is not of the same type of activity as the enumerated acts in I.C. § 18-1508, the lewd conduct statute, and thus does not constitute lewd conduct).

Applying the appropriate standards to this case, however, reveals Day has failed to carry his burden of establishing a variance of constitutional significance that requires reversal. Specifically, Day has failed to show that the variance affected the outcome of the trial, or that his counsel's failure to object was not a tactical decision.

A variance does not deprive a defendant of his substantial rights or require reversal simply because there is a hypothetical possibility that a jury may convict a defendant on conduct not alleged in the charging document. See State v. Montoya, 140 Idaho 160, 164-166, 90 P.3d 910, 914-916 (Ct. App. 2004). In Montoya, the information charged three counts of lewd conduct: one count of manual-genital contact, one count of oral-genital contact, and one count of genital-genital contact. Id. at 164, 90 P.3d at 914. However, the jury was instructed that an element of each crime was that Montoya "committed an act of manual-genital contact or oral-genital contact or genital-genital contact *or any*

other lewd or lascivious act upon the body of [the victim]' (emphasis added)." Id. Montoya contended there was a fatal variance between the information and jury instructions where the trial contained evidence that Montoya also french-kissed the victim and touched her breast, conduct for which he was not charged in the information. Id. at 166, 90 P.3d at 916. The Idaho Court of Appeals agreed there was a variance, but held that the variance was harmless beyond a reasonable doubt because it could find no reason to conclude that the jury would have believed some of the incidents alleged by the victim and not others, and because it concluded that the jury still would have found Montoya guilty of each count of lewd conduct without the variance. Id. at 164-166, 90 P.3d at 914-916.

Unlike Montoya, Day has the burden of showing the variance in the present case affected the outcome of the trial. In Montoya, a pre-Perry opinion, the Idaho Court of Appeals was required to find that the variance was harmless beyond a reasonable doubt in order to affirm the conviction. Montoya, 140 Idaho at 168, 90 P.3d at 918. However, the third prong of the Perry fundamental error test, unlike the Chapman v. California, 386 U.S. 18, 24 (1967) harmless error test, requires the defendant to show that error *actually* affected the outcome of the trial. Perry, 150 Idaho at 226-228, 245 P.3d at 978-980 ("In [the Chapman] harmless error review the burden of persuasion is on the State to demonstrate that the constitutional violation did not affect the outcome of the case. In [Perry] plain error review the burden is upon the defendant to demonstrate that the error

did affect the outcome." (emphasis in original).) Day cannot make the latter showing in this case. While it is hypothetically possible that the jury convicted Day solely on his contact with K.S.'s breast and not on either his contact with her vaginal area, or on her contact with his genitals, Day cannot affirmatively show that this occurred.

In order for the variance to have affected the trial outcome, the jury would have had to find that Day touched K.S.'s breasts with the requisite sexual intent, and that such contact constituted lewd conduct. The jury would have also had to find that the state did not prove that Day touched K.S.'s vaginal area and did not force K.S. to touch his genitals with the requisite sexual intent, or the jury would have had to not reached those allegations. These scenarios are extremely unlikely for a number of reasons.

The state's case focused around Day's touching of K.S.'s vaginal area, and K.S.'s touching of Day's genitals. K.S. testified about these contacts in detail, about how Day touched her in this manner several times while they played "ice wars," how he "felt around" her vaginal area, and how he held her hand down to where it touched his erect penis. (Tr., p.135, L.5 – p.148, L.1.) Day did not deny coming into contact with K.S.'s vaginal area, but claimed such contact was accidental. (Tr., p.211, Ls.4-17; p.213, Ls.6-19; p.223, Ls.6-11; p.227, L.10 – p.228, L.4.) The evidence that Day touched K.S.'s breasts with the requisite sexual intent was, by comparison, weaker, and less emphasized during the trial.

S.P. testified that she saw Day put ice, and his hand, into K.S.'s bathing suit, where he touched her breast. (Tr., p.162, L.12 – p.164, L.3.) S.P. did not testify about how long Day touched K.S.'s breast, or on how many occasions this occurred, and thus gave no or limited information regarding Day's sexual intent in carrying out that contact. (See Tr., p.159, L.17 – p.166, L.9.) It is thus much more likely that the jury found that Day engaged in manual-genital contact with K.S. than it is that the jury found *only* that Day engaged in manual-breast contact with K.S.

Further, the jury was not instructed that manual-breast contact could constitute lewd conduct in their guilt determination, but was specifically instructed that manual-genital contact with the requisite sexual intent did constitute the alleged lewd conduct. (R., pp.43-44, 116.) Manual-genital contact was, in fact, the only specific type of conduct identified as lewd conduct in the jury instructions. (Id.) Thus, assuming the jury followed the instructions, as this Court must, State v. Grantham, 146 Idaho 490, 198 P.3d 128 (Ct. App. 2008), the jury's finding of guilt must have been predicated on one of the incidents involving genital touching and not on the breast touching incident described by S.P. On appeal, Day has not asserted any particular reason why the jury might have found him guilty of lewd conduct exclusively for his contact with K.S.'s breast. He has therefore failed to affirmatively show that the variance affected the outcome of the trial.

Day has also failed to satisfy the second prong of Perry – i.e., show that the decision of his trial counsel to not object to the jury instructions was based on ignorance of the law or other objective shortcomings, as opposed to being merely a tactical decision. Perry, 150 Idaho at 226-228, 245 P.3d at 978-980. If Day's counsel determined, based on the factors discussed above, that the possibility of the jury convicting Day solely on his touching of K.S.'s breast was extremely remote, she may have chosen to leave the variance intact for potential appellate reversal should Day be convicted. This type of scenario does create the incentive to "sandbag," a tactic the fundamental error standard seeks to prevent. Id., 150 Idaho at 224, 245 P.3d at 976. Day is not entitled to a presumption that his counsel's decision was not tactical particularly where, as here, there is a reasonable basis for not objecting.

Day has failed to show fundamental error in the jury instructions and, as such, has failed to show any basis for reversal of his conviction.

CONCLUSION

The state respectfully requests that this Court affirm Day's convictions for lewd conduct.

DATED this 17th day of July 2012.

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of July 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

MARK W. OLSON
Deputy Attorney General

MWO/pm